



## INTERIOR BOARD OF INDIAN APPEALS

Doyle French v. Aberdeen Area Director, Bureau of Indian Affairs

22 IBIA 211 (08/11/1992)



# United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS  
INTERIOR BOARD OF INDIAN APPEALS  
4015 WILSON BOULEVARD  
ARLINGTON, VA 22203

DOYLE FRENCH

v.

ABERDEEN AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 92-2-A

Decided August 11, 1992

Appeal from the cancellation of four farming leases on the Omaha Reservation, Nebraska.

Affirmed.

1. Indians: Leases and Permits: Cancellation or Revocation--Indians: Leases and Permits: Violation/Breach: Generally

The failure to make timely rental payments for leased Indian trust or restricted property constitutes a breach of contract for which the lease may be cancelled.

2. Appeals: Generally--Indians: Leases and Permits: Cancellation or Revocation--Indians: Leases and Permits: Violation/Breach: Damages

When the Bureau of Indian Affairs believes that, because of a decision regarding a lease of trust or restricted property, immediate action is necessary to protect trust resources or to mitigate damages that might accrue against the lessee of that property, the best practice would be for the official to whom an appeal is taken, or to whom an appeal could be taken, to place the decision into immediate effect pursuant to 25 CFR 2.6(a).

3. Indians: Leases and Permits: Cancellation or Revocation

The fact that prior breaches of a lease of Indian trust or restricted land have been forgiven after the lessee cured the breaches does not create a right in the lessee to breach the lease in the future with impunity, nor does it deprive the Indian landowners of rights they have under the lease.

APPEARANCES: Doyle French, pro se; Mariana Shulstad, Esq., Field Solicitor, U.S. Department of the Interior, Twin Cities, Minnesota, for the Area Director.

OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

Appellant Doyle French seeks review of an August 6, 1991, decision of the Aberdeen Area Director, Bureau of Indian Affairs (BIA; Area Director), cancelling four farming leases on the Omaha Reservation, Nebraska. For the reasons discussed below, the Board of Indian Appeals (Board) affirms that decision.

Background

Appellant leased land on the Omaha Reservation. The leases at issue in this appeal are: (1) Lease 1003958792, effective March 1, 1987, and covering 160 acres of the Charles Porter Allotment 24-0 (Lease 1); (2) Lease 1003968792, effective March 1, 1987, and covering 73 acres of the Samuel Kemp Allotment 208-N (Lease 2); (3) Lease 1004158792, effective March 1, 1987, and covering 39 acres of the Lydia Drum Cline Allotment 639-N (Lease 3); and (4) Lease 1005508893, effective March 1, 1988, and covering 64 acres of the George Ramsey Allotment 620-0 (Lease 4). 1/

Each lease had a term of five years. The annual rentals for the leases were: Lease 1, \$5,400, to be paid to the Superintendent, Winnebago Agency, BIA (Superintendent); Lease 2, \$2,500, to be paid to the Superintendent; Lease 3, \$1,700, to be paid directly to the lessor, Gertrude Clay, with copies of cancelled checks to be provided to the Superintendent; and Lease 4, \$3,200 to be paid to the Superintendent. 2/

On April 1, 1991, the Superintendent notified appellant that his rental payments were past due. The Superintendent informed appellant that failure to pay rentals when due constituted a breach of contract, and gave appellant 10 days in which to make payment or show cause why the leases should not be cancelled.

By letter hand delivered to the Superintendent on April 11, 1991, appellant requested that he be given until May 1, 1991, to pay the rentals. The Superintendent responded on April 16, 1991, indicating

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1/ A fifth lease, Lease 1010049095, effective Mar. 1, 1990, and covering 40 acres of the Noah Walker Allotment 206-0 (Lease 5), was also cancelled. Appellant appealed from the cancellation of this lease to the Area Director, but did not raise it in his notice of appeal to the Board. Accordingly, the cancellation of this lease is affirmed. Even if cancellation were not affirmed based upon appellant's failure to appeal the decision as to this lease, it would be affirmed for the same reasons as are set forth in this opinion concerning the remaining four leases.

2/ The administrative record contains documents that indicate differing dates on which appellant's rental payments were due. It is possible that lease modifications were entered into that are not shown in the record. Under the specific facts of this case, the Board finds that these discrepancies constitute harmless error. However, in other cases, failure to be correct in the rental payment due date could cause significant problems.

that appellant would be given until noon on April 17, 1991, to make payment. The Superintendent stated that he was not in a position to consider additional requests for extensions because of the urgency of crop planting requirements on the tracts. The Superintendent also indicated that if appellant provided copies of his cancelled checks, advances made to landowners would be deducted from the total amount due. Appellant was later orally granted an additional extension until 4:30 pm on April 19, 1991. He was advised that no further extensions would be granted.

Appellant did not make the rental payments by April 19, 1991. Accordingly, by letter dated April 22, 1991, the Superintendent informed him that the leases were cancelled. 3/

Appellant appealed to the Area Director by letter dated May 4, 1991. Appellant argued that he was discriminated against because other people did not make timely rental payments and their leases were not cancelled; he had been allowed to make late rental payments in previous years without lease cancellation; he had two "outside leases" that he had always paid; 4/ the agency would not honor cancelled checks showing that he had made advance payments to some of the landowners; and the allotments were leased the day after his leases were cancelled.

On August 6, 1991, the Area Director upheld the Superintendent's decision, stating that the record showed a history of late payment problems.

The Board received appellant's notice of appeal on September 18, 1991. Briefs were filed by appellant and the Area Director.

### Discussion and Conclusions

[1] Appellant does not dispute that he failed to make timely rental payments, or that this failure constituted a breach of the leases. Appellant's failure in this regard constituted a breach of contract for which

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3/ By letter dated May 7, 1991, the Superintendent assessed \$2,004 in liquidated damages against appellant for violation of limitations in Leases 1, 2, and 3 concerning the planting of row crops. Although informed of his right to do so, appellant did not appeal from this decision. The administrative record shows that this was not the first time appellant was warned of problems resulting from his disregard of the row crop limitations. See, e.g., letters of Jan. 14, 1988; and Apr. 26 and June 8, 1989, from the Superintendent to appellant.

4/ In several places, appellant refers to "outside leases." From the context, it appears that appellant is using this term to refer to leases under which he made rental payments directly to the lessor(s). Only Lease 3 provided that rental payments were to be made to the lessor, and that lease further required that copies of the cancelled checks were to be given to the Superintendent. The remaining leases all provided that payments were to be made to the Superintendent.

the leases might properly be cancelled. U.S. Fish Corp. v. Eastern Area Director, 20 IBIA 93 (1991).

In appeals arising under 25 CFR Part 2, the appellant bears the burden of proving that the decision appealed from was erroneous or not supported by substantial evidence. All Materials of Montana, Inc. v. Billings Area Director, 21 IBIA 202, 213-14 (1992), and cases cited therein. In essence, appellant argues that his breach should have been excused. His arguments can be grouped into four categories: (1) there were procedural irregularities in the processing of his appeal; (2) he had established a course of dealing with BIA which related to late rental payments, and BIA should be estopped from denying this course of dealing or from taking action inconsistent with it; (3) he was treated differently than other lessees; and (4) he was actually given until April 26, 1991, rather than April 19, 1991, to make payment.

Appellant's first procedural argument is that he was not given a copy of the administrative record before the Area Director. Appellant does not cite any regulation requiring that he be given a copy of the record, and the Board is not aware of any such requirement. The Area Director states that a complete copy of the administrative record was made available to appellant following his appeal to the Board. Appellant raised no arguments based upon the contents of the record. The Area Director did not commit reversible error by not providing appellant with a copy of the administrative record when this matter was pending before him.

Appellant objects that the Superintendent did not file an answer to his appeal to the Area Director, allegedly in violation of 25 CFR 2.11(a). This section provides that "[a]ny interested party wishing to participate in an appeal proceeding should file a written answer responding to the appellant's notice of appeal and statement of reasons." 25 CFR 2.2 defines "interested party" to mean "any person whose interests could be adversely affected by a decision in an appeal." The Superintendent was not an "interested party" in this matter; he was the deciding official. As such, he was not required to file an answer. Furthermore, even if the Superintendent were construed to be an interested party, the filing of an answer is discretionary, not mandatory.

Appellant states that he "was not notified by the Area Director that he was considering any other documents as required by 25 C. F.R. § 2.21(b)" (Notice of appeal at 3). Section 2.21(b) requires the deciding official to disclose the fact that he or she has considered information not in the administrative record. If no outside information is considered, there is no disclosure requirement. Appellant does not indicate what information not in the administrative record he believes the Area Director considered. Because the Board finds no evidence that the Area Director considered evidence not in the administrative record, it holds that the Area Director committed no error.

Appellant contends that the Area Director failed to act upon his appeal within 30 days as required by the regulations. Action by an Area Director in a matter appealed to him or her is governed by 25 CFR 2.19.

Under section 2.19(a), "Area Directors \* \* \* shall render written decisions in all cases appealed to them within 60 days after all time for pleadings (including all extensions granted) has expired." (Emphasis added.) Appellant's notice of appeal to the Area Director was dated May 4, 1991, and was received on May 10, 1991. The last additional materials from appellant were received on May 28, 1991. Other interested parties had at least until June 20, 1991, to file an answer. The Area Director's decision was dated August 6, 1991, within the 60-day time period for issuing a decision. The Area Director's decision was not late.

[2] Appellant contends that the immediate leasing of the tracts to another individual violated the regulations. The Board has previously noted that 43 CFR 4.21(a) provides that a BIA decision is not effective during the time in which an appeal may be filed, and is pending. See also 25 CFR 2.6. It has also held that BIA has a responsibility to mitigate damages resulting from the breach and cancellation of a lease of trust or restricted property. Kombol v. Assistant Portland Area Director, 21 IBIA 116 (1991); Walch Logging Co. v. Assistant Portland Area Director (Economic Development), 11 IBIA 85 (1983). The avoidance of consequent damages may require BIA to take action to ensure that trust or restricted lands continue to be income-producing, and to otherwise protect them. In the absence of such a requirement, a breaching party might be liable to the landowners for significant amounts of monetary damages which could have been avoided. Kombol; Walch. The best practice would be for the BIA official to whom a decision is appealed, or to whom it can be appealed, to make a finding in accordance with 25 CFR 2.6(a) that the decision should be put into immediate effect. Under the circumstances of this case, however, the Board declines to hold that the leasing of these tracts to another individual constituted reversible error.

Appellant's second major category of arguments concerns his allegation that he had established a course of dealing with BIA which related to late rental payments, and BIA should be estopped from denying that course of dealing or from taking action inconsistent with it. Appellant contends that he had previously been late with rental payments with the only penalty being the imposition of interest; BIA had always given him credit for advance rental payments made to landowners, but refused to give him credit for advance payments for the 1991 crop year; and he was given no prior notice of the change in procedures in violation of due process.

The administrative record does not support appellant's allegations. Instead, the record shows a history of notification to appellant that his leases were subject to cancellation because of his continual late rental payments. In particular, the record contains late payment notices to appellant dated April 11, 1988, April 21, 1989, and April 3, 1990. Each of these notices clearly stated that failure to make the required payment could result in cancellation of the leases. A May 24, 1990, letter from the Superintendent to appellant stated that appellant's continual late payment to one landowner had resulted in her request to BIA that the lease be cancelled. The record also shows that appellant's leases have previously

been cancelled for failure to make timely rental payments. See, e.g., letters of June 1, 1988, August 2 and September 20, 1990, from the Superintendent to appellant; and letters of August 7, September 20, and October 11, 1990, from the Superintendent to appellant's surety. Appellant was on notice that his leases could be cancelled for failure to make timely rental payments.

[3] Although appellant's leases were reinstated in the past, the fact that his prior breaches were forgiven does not create an enforceable right for him to breach the leases in the future with impunity, nor does it deprive the landowners of the rights they have under the leases. In Mast v. Aberdeen Area Director, 19 IBIA 96, 99 (1990), the Board held that "[i]n considering whether a breach may be cured, it is entirely appropriate for BIA to take into account the lessee's past performance under the lease, particularly where the breach at issue is one of long duration or frequent recurrence." See also Strebe v. Deputy Assistant Secretary--Indian Affairs (Operations), 16 IBIA 62 (1988); Franks v. Deputy Assistant Secretary--Indian Affairs (Operations), 13 IBIA 231, 234 (1985); and Downtown Properties, Inc. v. Deputy Assistant Secretary--Indian Affairs (Operations), 13 IBIA 62, 67 (1984). The record here shows that appellant continually breached the leases by failing to make timely rental payments, he was warned that such failure could result in cancellation of the leases, his leases were cancelled on more than one occasion because of his failure to make timely rental payments, and at least some of the Indian landowners had lost patience with appellant's breaches. The Area Director did not err in cancelling appellant's leases based upon a "course of dealing."

Appellant also contends that in previous years he was given credit for advance payments made directly to the landowners, but that the Superintendent refused to give him credit for advance payments made for the 1991 rental year.

Under the provisions of Lease 3, appellant was to make rental payments directly to the lessor, Gertrude Clay, and provide copies of his cancelled checks to the Superintendent. The record contains an April 16, 1991, note from Clay stating: "I have received my 1991 cash rent in full on allot. 639-0 Lydia Drum Cline." This statement is repeated in a May 21, 1991, letter to the Aberdeen Area Realty Officer signed by both Clay and appellant. Although the record contains many photocopies of cancelled checks, the Board was unable to locate any checks payable to Clay. Neither did appellant include photocopies of any cancelled checks to Clay in any of his filings with the Board.

Another note, dated April 18, 1991, addressed to the Winnebago Agency, and signed by Marie Walker, Emily Walker, and Benjamin Walker, states: "We have received our 1991 cash rent on allot. 208-N Samuel Kemp." The title status report for Allotment 208-N shows that title was held equally by four individuals: Benjamin Walker, who died on September 18, 1991; Marie Walker; Emily Walker; and Darlene Walker, whose whereabouts are unknown. Lease 2 provides that the annual rent was to be paid to the Superintendent. The administrative record contains photocopies of numerous checks made payable

to Ben Walker. These cancelled checks total \$625, the amount which was due to Ben Walker under Lease 2. No photocopies of checks to Marie or Emily Walker for advance payments for the 1991 rental year appear in the record or the filings on appeal. There is also no indication that payment of any kind was made on behalf of Darlene Walker. 5/

The administrative record also contains photocopies of cancelled checks made payable to Edna Phillips, who owns an undivided 267/1152 interest in the Charles Porter allotment, which is covered by lease 1. These cancelled checks total \$205, which is less than the amount due to Phillips under the lease.

Even if appellant had been given credit for advance payments for the 1991 rental year, as to lease 3, he has not proven that advance payments were actually made, and as to Leases 1 and 2, he has not shown that any advance payments made equalled the rent due to each individual. As previously mentioned, appellant bears the burden of proving the error in the Area Director's decision. Appellant's evidence is not sufficient to carry his burden of proving that he made adequate rental payments.

Appellant's third major category of arguments is that he was treated differently than other lessees who were late in making rental payments. He argues that other lessees were allowed to pay rent late without having their leases cancelled; the administrative record should contain a statistical analysis of the number of farm leases which were cancelled due to the failure to pay rent during the same time period; and he was discriminated against because he is a "small farmer," and the Superintendent allegedly stated that he wanted to replace small farmers with "good farmers," whom the Superintendent defined as "big farmers."

Appellant's arguments in this area presuppose that all lessees must be treated the same. This presupposition is not warranted. The determination of the appropriate action to be taken following a breach of contract is very fact-specific. In appellant's case, the history of breaches fully justified cancellation of the leases. Mast, supra.

Appellant's final argument is that he was given until April 26, 1991, to make payment, not April 19, 1991, as stated by the Superintendent and Area Director. Appellant contends that there is a dispute of material fact on this issue. Appellant does not, however, offer any evidence to support his allegation.

The Board is not required to address issues and arguments raised for the first time on appeal. See, e.g., All Materials of Montana, Inc., supra, 21 IBIA at 212, and cases cited therein. Although appellant told the Area

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5/ It is conceivable that the lessors under leases 2 and 3 intended to state that they had received the rent in cash. The administrative record shows that appellant was on notice from prior years that he had to present BIA with evidence of payment in the form of cancelled checks or similar documentary proof.

Director he could have made payment by April 26, 1991, he did not argue that the Superintendent had actually given him until that date to make payment. The Board declines to consider this argument at this late point in the administrative review process.

Furthermore, even if the Board were to consider this issue, appellant bears the burden of establishing sufficient grounds for referring a matter for an evidentiary hearing. In order to carry this burden, he must do more than make an unsupported allegation. Appellant has failed to show that he was given until April 26, 1991, to make payment, or to present adequate support for referring the issue for a hearing.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the August 6, 1991, decision of the Aberdeen Area Director is affirmed.

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//original signed  
Kathryn A. Lynn  
Chief Administrative Judge

I concur:

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//original signed  
Anita Vogt  
Administrative Judge